

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

EDWARD LEE SMITH,

Petitioner,

vs.

GLEN WHORTON, et al.,

Respondents.

Case No. 2:06-CV-00291-RLH-(RJJ)

**ORDER**

Before the Court are Respondents' Motion to Dismiss (#19) with supporting Exhibits (#20, #21) and Petitioner's Response (#29). Five days before Respondents submitted their Motion (#19), Petitioner sent to the Court and served upon Respondents by mail a First Amended Petition for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 (#24); it arrived in the Court on the same day as the Motion to Dismiss (#19). The First Amended Petition (#24) is equivalent to the original Petition (#3), with respect to the arguments in the Motion to Dismiss (#19), and the Court will apply the Motion (#19) to the First Amended Petition (#24). The Court finds that some of Petitioner's claims are procedurally defaulted and that one claim is not exhausted.

After a jury trial, the Eighth Judicial District Court of the State of Nevada convicted Petitioner of second degree murder with the use of a deadly weapon. Ex. 32 (#20-9, p. 16).<sup>1</sup> Petitioner appealed, and the Nevada Supreme Court affirmed on November 21, 2003. Ex. 37 (#20-12, p. 16). Petitioner then filed a post-conviction petition for a writ of habeas corpus in the state

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<sup>1</sup>Page numbers in parentheses refer to the Court's electronic image file.

1 court on June 8, 2004. Ex. 39 (#21-2 through #21-5, p. 16). Petitioner filed an amended petition on  
2 July 9, 2004. Ex. 41 (#21-6 through #21-9). The state court denied the petition on December 7,  
3 2004. Ex. 45 (#21-12, p. 2). Petitioner appealed, and the Nevada Supreme Court affirmed on April  
4 4, 2005. Ex. 48 (#21-13, p. 2). Petitioner then commenced this action.

5 Grounds 3 and 4 are at issue in the Motion (#19). Respondents have divided Ground  
6 3 into two parts, and the Court adopts that division. Ground 3(A) claims that the prosecutor  
7 committed misconduct in the closing argument by stating, "Not once did you hear about an incident  
8 where the [D]efendant was chasing people away from his car. Or, is upset that people are sitting on  
9 his car or in it." First Amended Petition, p. 7 (#24, p. 14). Ground 3(B) claims that the prosecutor  
10 misrepresented the nature of the wounds sustained by the decedent. *Id.*, p. 7A (#24, p. 15). In  
11 Ground 4, Petitioner claims that police officers harassed Eric Orduna, a witness for the defense,  
12 right before he was scheduled to testify, "to have a chilling effect on the Defendant's substantive  
13 right to have compulsory process for obtaining witnesses in his favor." *Id.*, pp. 9-10 (#24, pp. 18-  
14 19).

15 Petitioner raised Grounds 3(B) and 4 for the first time in his state habeas corpus  
16 petition. The district court found that Petitioner had waived the grounds because he had not raised  
17 them in his direct appeal. Ex. 45, pp. 4, 8 (#21-12, pp. 6, 10) (citing Nev. Rev. Stat. § 34.810). The  
18 Nevada Supreme Court found the same thing. Ex. 48, pp. 13-14 (#21-13, pp. 14-15) (citing Nev.  
19 Rev. Stat. § 34.810).

20 A federal court will not review a claim for habeas corpus relief if the decision of the  
21 state court regarding that claim rested on a state-law ground that is independent of the federal  
22 question and adequate to support the judgment. Coleman v. Thompson, 501 U.S. 722, 730-31  
23 (1991).

24 In all cases in which a state prisoner has defaulted his federal claims  
25 in state court pursuant to an independent and adequate state  
26 procedural rule, federal habeas review of the claims is barred unless  
27 the prisoner can demonstrate cause for the default and actual prejudice  
28 as a result of the alleged violation of federal law, or demonstrate that  
failure to consider the claims will result in a fundamental miscarriage  
of justice.

1 Id. at 750; see also Murray v. Carrier, 477 U.S. 478, 485 (1986). Contrary to Petitioner’s argument,  
2 the ground for dismissal upon which the Nevada Supreme Court relied in this case is an adequate  
3 and independent state rule. Vang v. Nevada, 329 F.3d 1069, 1074 (9th Cir. 2003) (Nev. Rev. Stat.  
4 § 34.810).

5 To demonstrate cause to excuse a procedural default, the petitioner must “show that  
6 some objective factor external to the defense impeded” his efforts to comply with the state  
7 procedural rule. Murray, 477 U.S. at 488 (emphasis added). For cause to exist, the external  
8 impediment must have prevented the petitioner from raising the claim. See McCleskey v. Zant, 499  
9 U.S. 467, 497 (1991).

10 Petitioner argues that his appellate counsel was ineffective for failing to raise the  
11 issues in Grounds 3(B) and 4 on direct appeal. A claim of constitutionally ineffective assistance of  
12 counsel can be cause to excuse a procedural default. Murray, 477 U.S. at 488-89. However, that  
13 claim must be raised and exhausted as a separate ground in State court. Id. at 489. Also, the claim  
14 of ineffective assistance of counsel must itself not be procedurally defaulted. Edwards v. Carpenter,  
15 529 U.S. 446, 452-53 (2000). The Court has reviewed Petitioner’s amended state habeas corpus  
16 petition. Ex. 41 (#21-6 through #21-9). In it, he did not argue that appellate counsel was ineffective  
17 for failing to raise the issues of prosecutorial misrepresentation of the decedent’s wounds or the  
18 harassment of Eric Orduna before Orduna was to testify. Because Petitioner did not present this  
19 ineffective-assistance argument to the state courts, the argument cannot constitute good cause to  
20 excuse the procedural default of Grounds 3(B) and 4.

21 Respondents also contend that Ground 3(A) is unexhausted. Before a federal court  
22 may consider a petition for a writ of habeas corpus, the petitioner must exhaust the remedies  
23 available in state court. 28 U.S.C. § 2254(b). To exhaust a ground for relief, a petitioner must fairly  
24 present that ground to the state’s highest court, describing the operative facts and legal theory, and  
25 give that court the opportunity to address and resolve the ground. See Duncan v. Henry, 513 U.S.  
26 364, 365 (1995) (per curiam); Anderson v. Harless, 459 U.S. 4, 6 (1982).

27 “[A] petitioner for habeas corpus relief under 28 U.S.C. § 2254 exhausts available  
28 state remedies only if he characterized the claims he raised in state proceedings specifically as

1 federal claims. In short, the petitioner must have either referenced specific provisions of the federal  
2 constitution or statutes or cited to federal case law.” Lyons v. Crawford, 232 F.3d 666, 670 (9th Cir.  
3 2000) (emphasis in original), amended, 247 F.3d 904 (9th Cir. 2001). Citation to state case law  
4 which applies federal constitutional principles will also suffice. Peterson v. Lampert, 319 F.3d  
5 1153, 1158 (9th Cir. 2003) (en banc). “The mere similarity between a claim of state and federal  
6 error is insufficient to establish exhaustion. Moreover, general appeals to broad constitutional  
7 principles, such as due process, equal protection, and the right to a fair trial, are insufficient to  
8 establish exhaustion.” Hiivala v. Wood, 195 F.3d 1098, 1106 (9th Cir. 1999) (citations omitted).

9           Petitioner has not presented the issue in Ground 3(A) to the state courts. Petitioner  
10 did not raise improper closing argument as an issue in his direct appeal. See Ex. 34 (#20-10 through  
11 #20-11). Petitioner did raise improper closing argument in Ground 6 of his amended state habeas  
12 corpus petition. Ex. 41, pp. 33-42 (#21-8, pp. 14-23). However, that ground concerned the  
13 prosecutor’s comments about the nature of the victim’s wounds. State Ground 6 had nothing to do  
14 with the prosecutor’s comments that the jury never heard evidence that Petitioner was chasing  
15 people away from his car or that Petitioner was unhappy with people sitting in or on his car.  
16 Therefore, Ground 3(A) is unexhausted.

17           The Amended Petition (#24) is mixed, containing both claims exhausted in state  
18 court and claims not exhausted in state court, and it is subject to dismissal. See Rose v. Lundy, 455  
19 U.S. 509, 521-22 (1982); Szeto v. Rushen, 709 F.2d 1340, 1341 (9th Cir. 1983). Petitioner may  
20 voluntarily dismiss the unexhausted Ground 3(A) and proceed with the remaining grounds, he may  
21 voluntarily dismiss this action without prejudice while he returns to state court to exhaust Ground  
22 3(A), or he may move to stay this action while he returns to state court to exhaust Ground 3(A).

23           Petitioner has asked for a stay. Response, p. 3 (#29). He must show that he has  
24 “good cause for his failure to exhaust, his unexhausted claims are potentially meritorious, and there  
25 is no indication that the petitioner engaged in intentionally dilatory litigation tactics.” Rhines v.  
26 Weber, 544 U.S. 269, 278 (2005). Petitioner argues that good cause exists because appellate  
27 counsel was ineffective for failing to raise Ground 3(A) on direct appeal. However, just as with  
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1 Grounds 3(B) and 4, Petitioner did not present this ineffective-assistance claim to the state courts in  
 2 his state habeas corpus petition, and it cannot amount to good cause to excuse the failure to exhaust.

3 The Court has also reviewed the Amended Petition (#24) pursuant to Rule 4 of the  
 4 Rules Governing Section 2254 Cases in the United States District Courts. When the Court screened  
 5 the original Petition, it dismissed Ground 1 and paragraphs 3-8 of Ground 6

6 In Ground One, Petitioner claims that at the preliminary hearing the state  
 7 failed to present evidence sufficient to establish probable cause that he committed  
 8 murder. "There is no federal Constitutional right to a preliminary hearing." Hines v.  
 9 Enomoto, 658 F.2d 667, 677 (9th Cir. 1981) (citing Ramirez v. State of Arizona, 437  
 10 F.2d 119 (9th Cir. 1971)) (abrogated on other grounds by Ross v. Oklahoma, 487  
 11 U.S. 81 (1988)). Petitioner is arguing a point of state law, which is not cognizable in  
 12 federal habeas corpus. See Estelle v. McGuire, 502 U.S. 62, 67 (1991). The Court  
 13 dismisses Ground One.

14 In Ground Six, paragraphs 3-8, Petitioner describes errors that the state courts  
 15 committed during his state habeas corpus petition. "[A] petition alleging errors in  
 16 the state post-conviction review process is not addressable through habeas corpus  
 17 proceedings." Franzen v. Brinkman, 877 F.2d 26, 26 (9th Cir. 1989); see also  
 18 Gerlaugh v. Stewart, 129 F.3d 1027, 1045 (9th Cir. 1997). The Court dismisses this  
 19 part of Ground Six.

20 Order, pp. 1-2 (#11). Ground 1 and Ground 6, paragraphs 3-8, of the Amended Petition (#24) are  
 21 identical to Ground 1 and Ground 6, paragraphs 3-8, of the original Petition (#3). The Court  
 22 dismisses these grounds for the same reasons.

23 IT IS THEREFORE ORDERED that Respondents' Motion to Dismiss (#19) is  
 24 **GRANTED.**

25 IT IS FURTHER ORDERED that Grounds 3(B) and 4 are **DISMISSED** as  
 26 procedurally defaulted.

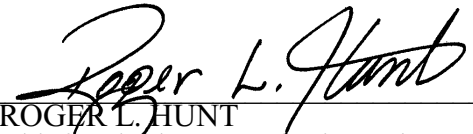
27 IT IS FURTHER ORDERED that Ground 1 and Ground 6, paragraphs 3-8 are  
 28 **DISMISSED.**

IT IS FURTHER ORDERED that Petitioner shall have thirty (30) days from the date  
 of entry of this Order to do one of the following: (1) inform this Court in a sworn declaration that  
 he wishes to dismiss Ground 3(A) of his Amended Petition (#24), and proceed only on the  
 remaining grounds for relief, or (2) inform this Court in a sworn declaration that he wishes to  
 dismiss his Amended Petition (#24) to return to state court to exhaust his state remedies with respect  
 to the claims set out in Ground 3(A). Failure to comply will result in the dismissal of this action.

1 IT IS FURTHER ORDERED that if Petitioner elects to dismiss Ground 3(A) of his  
2 Amended Petition (#24) and proceed on the remaining grounds, Respondents shall file and serve an  
3 answer or other response to the remaining grounds within thirty (30) days after Petitioner serves his  
4 declaration dismissing those grounds. If Respondents file and serve an answer, it shall comply with  
5 Rule 5 of the Rules Governing Section 2254 Cases in the United States District Courts.

6 IT IS FURTHER ORDERED that if Respondents file and serve an answer, Petitioner  
7 shall have thirty (30) days from the date on which the answer is served to file and serve a reply.

8 DATED this 7<sup>th</sup> day of August, 2007.

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11 ROGER L. HUNT  
12 Chief United States District Judge  
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